

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JAMES KIRK,

Petitioner,

-v.-

JOHN BURGE, Superintendent,
Elmira Correctional Facility,

Respondent.
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07 Civ. 7467 (LTS)(GWG)

REPORT AND
RECOMMENDATION

GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE

Petitioner's petition for writ of habeas corpus was denied by a judgment filed August 7, 2009 (Docket # 29). Petitioner, through his attorney, timely appealed from that judgment but the Court of Appeals dismissed the appeal for procedural failings that occurred in the Court of Appeals. Petitioner now seeks to have this Court "reissu[e] [its] Mandate in order to allow Petitioner [to] appeal anew," see Petition Pursuant to Fed. R. Civ. P. 60(b)(6), filed Oct. 8, 2010 (Docket # 34) (internal quotation marks omitted), apparently because his counsel did not properly pursue the appeal in the court of appeals. There is no basis for such relief, however, as petitioner points to no infirmity in the district court's judgment that renders it improper. Instead, his complaint is that the court of appeals improperly denied his application to recall its mandate and allow him to pursue the appeal. This Court, however, has no power to review actions of the court of appeals.

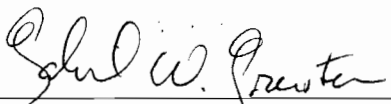
Conclusion

For the foregoing reasons, Kirk's motion pursuant to Fed. R. Civ. P. 60(b)(b) (Docket # 34) should be denied.

**PROCEDURE FOR FILING OBJECTIONS TO THIS
REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report and Recommendation to serve and file any objections. See also Fed. R. Civ. P. 6(a), (b), (d). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Laura T. Swain, and to the undersigned, at 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Swain. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985).

Dated: October 19, 2010
New York, New York



GABRIEL W. GORENSTEIN
United States Magistrate Judge

Copies mailed to:

James Kirk
04-A-1459
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

Lisa Fleischmann
Assistant Attorney General
120 Broadway
New York, NY 10271